(1) 88-1206

NO._____

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DELTA TRUCK & TRACTOR, INC.,

PETITIONERS

VERSUS

J.I. CASE COMPANY
TENNECO, INC.
NAVISTAR INTERNATIONAL CORPORATION
(FORMERLY INTERNATIONAL HARVESTER COMPANY)

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. THE QUESTIONS PRESENTED FOR REVIEW:

1. Has petitioner alleged an enterprise, or must petitioner assert in its pleadings as a matter of law that the defendants posed a continuous threat as RICO persons?
2. Can an associated-in-fact enterprise engage in a pattern of racketeering activity effectively infiltrating hundreds of legitimate businesses and nonetheless fall outside RICO's ambit because the enterprise does not display sufficient "ongoing continuity"?
3. Must an association-in-fact enterprise be alleged to have an existence separate and apart from the racketeering activity in which it engages or may the enterprise be in effect, no more than the sum of the predicate acts?

II. THE LIST OF ALL PARTIES:

Petitioner: Delta Truck and Tractor, Inc.

Respondents: J.I. Case Company; Tenneco, Inc.; Navistar International Corporation (formerly International Harvester Company)

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Designation of Corporate Relationships

Delta Truck & Tractor, Inc. is not owned by any parent corporations, does not have an ownership interest in any subsidiaries, and does not have any affiliates.

IV. TABLE OF AUTHORITIES:

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V. REFERENCE TO OFFICIAL & UNOFFICIAL OPINIONS BELOW:

Delta Truck & Tractor, Inc. v. J.I. Case Company, et al., 855 F.2d 241 (5th Cir. 1988).

VI. THE JURISDICTION OF THE COURT:

The jurisdiction of this Honorable Court is established by 28 U.S.C. 2101(c). The date of the judgment rendered by the Fifth Circuit Court of Appeals for the United States of America is September 20, 1988.

VII. THE APPLICABLE STATUTES:

1. 18 U.S.C. § 1961(1)-(5) - Definitions As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any

act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information) section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to

retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under

title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or

entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

2. 18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful

debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect

one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

3. 18 U.S.C. § 1964(c) - Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

VIII. A CONCISE STATEMENT OF THE CASE:

A. THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE:

Federal district court jurisdiction was based on 28 U.S.C. 1332(a) and jurisdiction over the Civil RICO count obtained under 18 U.S.C. 1964 and 28 U.S.C. 1331(a).

B. THE STATEMENT OF THE CASE:

Delta alleges respondents formed an associated-in-fact enterprise and engaged in the conduct of that enterprise through a pattern of racketeering activity aimed at appropriating petitioner's business assets and the assets of over 400 other dealerships at less than fair market value. Its RICO count was dismissed for failing to assert respondents posed a continuous threat as RICO persons. The infiltration of 400 legitimate business entities reflects exactly that sort of invidious stealth meant to be snared by RICO. Any continuity requirement engrafted on the enterprise aspect of a RICO claim must be met by these facts. The three corporate

respondents can not have engaged in the pattern of racketeering activity, effectively victimizing hundreds of legitimate businesses, and not pose the kind of threat to this nation's economic well-being RICO was enacted to curb.

THE PROCEDURAL POSTURE

Petitioner ("Delta") instituted this action on September 5, 1985. On January 15, 1986, plaintiff added Count Eleven (the "RICO" count) in its first amended complaint. The RICO count was asserted against respondents and individuals no longer in the suit.[1]

Defendants filed a motion to dismiss the RICO count on February 28, 1986 under FRCP 12(b)(6) and 9(b) for purported failure to allege with sufficient particularity the circumstances of fraud underlying the claims and a "pattern of racketeering activity."

In July, 1986, plaintiff sought to amend to

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1. Jerome K. Green, John A. Borden, R.A. Rosen, James L. Kettlesen and James Gill; they were dismissed pursuant to a stipulation no ultra vires defense would be raised.

specify with more particularity the predicate acts. The second amended complaint April 8, 1987 was allowed by the same Ruling granting defendants' 12(b)(6) motion to dismiss. Final judgment, signed on June 2, 1987, was filed on June 3, 1987. On June 16, 1987 plaintiff filed Notice of Appeal to Fifth Circuit, who affirmed the 12(b)(6) dismissal of the RICO count on September 20, 1988. The opinion held that as a matter of law, since "the pleadings do not assert that the corporate defendants posed a continuous threat as RICO persons", petitioner's claim failed to state a RICO cause of action. Delta Truck & Tractor v. J.I.Case, et al, 855 F.2d 241, 244 (5th Cir. 1988).

STATEMENT OF THE FACTS

Delta is involved in the agricultural equipment business (sales and repairs of farm equipment, implements and supplies). Delta's business regularly and systematically affects both interstate and foreign commerce. Delta, formed in 1962 as an International Harvester franchised dealer, became eligible in 1976 to

become an "XL" dealer under IH's "XL" dealership program. Delta was required to meet IH requirements relating to capital structure, buildings, computerized accountings, parts inventory, sales and sales quotas, schooling and training, etc. The quid pro was that the dealership was to continue indefinitely unless specific cause, as defined in the dealership agreement, existed for termination. This contract could not be assigned without the written consent of the "XL" dealer. Delta complied and was made an "XL" dealer on April 7, 1977. This dealership contract was in effect when Delta's dealership was terminated on January 15, 1985.

In 1984, IH began negotiations with Tenneco and Case which culminated in a November 26, 1984 purchase agreement. IH agreed to sell Tenneco and Case IH's agricultural equipment business. Respondents prior to and during this time frame falsely and fraudulently misled petitioner and other IH dealerships, their creditors, customers and business associates

through misrepresentations that IH fully intended and would in fact continue as a solid business concern in the agricultural equipment business. The crux of the RICO claim involves the pattern of racketeering activity employed by defendants to deal with approximately 400 situations where IH and Case dealers were competing with each other in specific geographical markets. Defendants formed an associated-in-fact enterprise which engaged in a pattern of racketeering activities to appropriate businesses and assets of terminated dealers by intimidation, coercion, extortion, wrongful acts/omissions and misleadingly false and fraudulent statements. These acts and/or omissions were to gain the terminated dealers' release of contractual and property rights and all other claims for substantially less than fair compensation.

Prior to the actual termination of the dealerships defendants wrongfully and fraudulently misled the dealers defendants intended to terminate in order to have those

dealers (1) continue maintenance of their customer relationships, contacts and good will; and (2) induce them to supply defendants with confidential business and financial information to assist defendants in assessing a dealer's bargaining position. A series of meetings beginning on or about November 28, 1984 in Dallas, Texas were held, preceded by a national mailing of airline tickets to dealers. The defendants represented to Delta and other IH dealers that competing IH and Case dealers in the roughly 400 conflict areas would be consolidated, merged or purchased. They falsely misrepresented that (1) the surviving dealer in each conflict area would be selected fairly and objectively; (2) the terminated dealers would be compensated fairly in good faith negotiations; (3) financing would be made available for sales from existing inventories; and (4) all dealers would be permitted to continue in business as before during the transition period. Defendants never intended to fulfill or otherwise comply with these

representations, and had, as a matter of fact, already determined many, if not all, of the dealerships which would be terminated, but fraudulently misled Delta and other dealers concerning this fact.

On or about December 21, 1984 defendants Case and Tenneco submitted nationwide letters through the United States Mail soliciting, in part, "[a]ny information you may have which you feel could be helpful to our valuation" of which dealer in a conflict area should be chosen as the survivor. Relying upon the misrepresentation that the decision as to the survivor had not been made, Delta, as did numerous other dealers receiving this correspondence, furnished detailed confidential business and personal financial information to defendants in support of their applications to be granted new dealership agreements. Delta alleges it was fraudulently misled by these misrepresentations into divulging highly confidential business and financial information which defendants later

used in bad faith negotiations and/or litigation with it and other terminated dealers. Delta's business assets have been appropriated by defendants, and Delta has not been compensated for the good will of its dealership and other assets, contrary to the material misrepresentations made to that effect. Contrary to other representations, Delta has not been favored with the compensation it was entitled to receive upon termination of its IH contract. To this date, the accomplished scheme stands relatively intact, while hundreds of legitimate American businesses lay financially bereft if not slain by the pervasive and insidious workings of the enterprise created by these defendants.

On January 14, 1985, the day before Delta's dealership was terminated, defendants used the interstate telephone system to threaten another dealership that it would be forced out of business if it did not agree to terminate its IH dealership agreement on defendants' terms. Case and Tenneco refused to allow plaintiff to

quote on substantial orders for IH equipment on January 17, 1985, two days after Delta was advised it would not be offered a new dealership, but while its IH contract remained in force. On February 17, 1985, Delta was informed that all allowed purchases by it would have to be on a cash basis. Case and Tenneco furnished the surviving dealership with Delta's customer list thereby appropriating Delta's good will, customers, and its parts and service business without paying any compensation. Defendants used the United States Mails and telephone systems on numerous occasions to accomplish the enterprise's illegal objectives and purposes.

IX. **ARGUMENT**

The dismissal of plaintiff's 22 page Count Eleven presents this court with a dismissal under 12(b)(6) which must be reversed. Taking the complaint's allegations as true, it is certainly not beyond a doubt that plaintiff can prove no set of facts which would entitle plaintiff to relief under RICO. Associated

General Contractors Of California, Inc. vs. California State Council Of Carpenters, 459 U.S. 519, 525, 103 S.Ct. 897, 902, 74 L. Ed. 2d 723 (1983); Conley vs. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L. Ed. 2d (1957).

"CONTINUING/ONGOING" ENTERPRISE REQUIREMENT

There is no requirement that the persons comprising an associated-in-fact enterprise must pose a threat of continuous harm as RICO persons before they can be held liable under RICO. Petitioner rejects the notion that "persons" can develop a fraudulent scheme, collectively collaborate in the execution and perpetration of the scheme on literally hundreds of victimized legitimate businesses, and not be subject to RICO liability because petitioner didn't assert the defendants posed a continuous threat as RICO persons. Petitioner disputes the notion that RICO does not sanction enterprises who have completed their schemes, infiltrated the legitimate businesses and, therefore purportedly no longer pose a

continuing threat as RICO persons.

The Fifth Circuit affirmed the FRCP 12(b)(6) dismissal of petitioner's RICO count against respondents, after holding that a sufficient pattern of racketeering activity was alleged. The holding that petitioner's complaint was legally insufficient seems to be based in part upon United States vs. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L. Ed. 2d 246 (1981), on operative language which reads as follows:

> "In order to secure a conviction under RICO, the government must prove both the existence of an 'enterprise' and the connected 'pattern' of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute [citation omitted]. The former is proved by evidence of an on-going organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern

> of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved..."

[Emphasis supplied]; Id., 101 S.Ct. @ 2528-29.

The crux of petitioner's Writ is the meaning to be given to the requirements that an enterprise be an "ongoing organization" and a "continuing unit". The Fifth Circuit has imposed a requirement that unless the defendant persons are still involved at the time of the complaint in the activities of an enterprise and therefore continue to pose a continuing threat as RICO persons, no enterprise exists as a matter of law. Such an interpretation leads to unjust results under the facts of this case. Defendant persons used federal mail and interstate telephone systems in the furtherance of a scheme which involved false promises and misrepresentations about existing facts and future events, all calculated to deprive hundreds of businesses of valuable property rights by trick, deceit, chicane and overreaching. See. e.g., McNally v. United States, 483 U.S. ___, 107 S.Ct. 2875, 2881, 97

L.Ed.2d 292 (1987).

Does the fact that persons, in order to realize their enterprise objectives, do not engage in the pattern of activity for a long time allow them to escape RICO liability? Can persons engage in blitzkrieg tactics and infiltrate hundreds of businesses quickly so as to avoid being an enterprise under the "ongoing organization" and/or "continuing unit" doctrine? There is a definite conflict in the Circuits as to this premise. Petitioner argues that there is no proscription of liability under RICO for completed schemes, whether blitzkrieg in nature or more slowly accomplished.

In Liquid Air Corporation v. Rodgers, 834 F.2d 1297 (7th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3531 (U.S. Jan. 28, 1988) (No.87-1262), the appellate panel rejected an argument by defendants that no liability could exist unless they posed some kind of continuing threat as RICO persons:

> Defendants object because the charge failed to advise the jury that there be "some

> continuing threat of racketeering activity." Defendants argue that the continuity requirement of Sedima mandates that there be a threat that defendants would engage in future acts of racketeering after completion of their scheme. **This is an untenable interpretation of the requirement of continuity. The requirement of continuity was not intended to force a court to guess the likelihood of future criminal conduct nor was it intended to proscribe liability for completed schemes.** Continuity refers instead to the duration of the predicate acts.

[Emphasis supplied]; Liquid Air, supra, 834 F.2d @ 1308.

The Liquid Air panel affirmed a RICO conviction for a pattern of racketeering activity involving a single scheme which lasted seven months and defrauded a single victim. Id., 834 F.2d @ 1304. Its holding is clearly in conflict with that in the present case, where the Fifth Circuit has held this petitioner's RICO count is defective because petitioner did not assert at the pleading stage that the respondents posed a continuous threat as RICO persons. This holding is remarkably similar to the argument rejected in Liquid Air - i.e. unless it were asserted and proved defendants would engage in future acts of

racketeering after completion of their scheme, defendants could not be liable under RICO. Petitioner argues not only was there no need to assert defendants posed a threat of continuing harm as RICO persons, there was no need to even prove such. Just because these persons did in a short time what others may have taken longer to accomplish does not change the result- hundreds of legitimate businesses were infiltrated effectively by the enterprise's executed pattern. The target of RICO expressed in the Senate Report quoted in the now-legendary footnote 14 of Sedima, S.P.R.L. vs. Imerex Company, Inc., 473 U.S. 479, 105 S.Ct. 3275, 87 L. Ed.2d 346 (1985) is clear- preventing effective infiltration of legitimate businesses by RICO persons:

> ...As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate businesses normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969)....

[Emphasis supplied by Court]; Sedima, supra, 105 S. Ct. at 3285, n. 14.

In Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36 (3rd Cir. 1987), the Third Circuit reversed a district court's decision granting a motion to dismiss a RICO count. The district court found the complaint alleged only a single scheme which was not open-ended because the enterprise had fully obtained its objective and, hence, the defendants posed no threat of further unlawful activity. Id., 832 F.2d @ 38. The Third Circuit first rejected the notion two distinct unlawful schemes are required:

> ..a rule requiring two or more schemes would exempt from RICO liability defendants who engage in only a single unlawful scheme, however extensive and injurious. Such an outcome is plainly inconsistent with the purposes of the statute.

Id., 832 F.2d @ 39.

This court should also reject this notion, if it has not already done so in H.J., Inc. v. Northwestern Bell Telephone Company, 829 F.2d 648 (8th Cir. 1987), cert granted, 56 U.S.L.W. 3647 (U.S. Mar. 21, 1988)(No.87-1252) and/or Terra Du Lac Association, Inc. v. Terra Du Lac,

Inc., 834 F.2d 148 (8th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3755 (U.S. Apr. 21,1988) (No. 87-1742).

The Barticheck court went on to deal with the premise there can be no liability unless the scheme is continuously ongoing or open-ended:

> **We do not believe, however, that the notion of continuity compels a requirement of "open-endedness."** At the very least, such a requirement would produce anomalous results. This approach would allow a party to maintain a RICO claim if he brought suit before the unlawful scheme had attained its objective; in such a case the scheme would presumably be considered open-ended. This same interpretation, though, would deny a RICO cause of action in a case where the scheme had fully accomplished its goal. Yet **it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO**.
>
> We read the legislative history's reference to "continuity" as simply calling for an inquiry into the extent of the racketeering activity. Although temporal open-endedness may be one measure of extent, it is not the only one. We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be "continuous." This determination necessarily depends on the circumstances of the particular case.

[Emphasis supplied]; Id., 832 F.2d @ 39-40.

It is the completed scheme that confronts this court. The accomplished scheme has indeed

inflicted great harm and strongly implicates the remedial purposes of RICO. The anomaly described in the hypothetical by Barticheck has crystallized in the facts of this case. Petitioner suggests that the "continuity" requirement, whether discussed in terms of "pattern" and/or "enterprise", requires a detailed analysis of the facts of any given case. Simply because the respondents engaged in but a single mammoth scheme which was expeditiously executed poses no bar to RICO recovery under these facts. This scheme victimized literally hundreds of similarly situated businesses subjected to similar acts accomplished by respondents. The fact that multiple victims were present in Barticheck influenced that panel:

> **Most significantly, the scheme involved the repetition of similar misrepresentations to more than twenty investors.** To refer to such conduct as a "pattern' of fraudulent activity certainly comports with the ordinary understanding of the term, and **we believe that this conduct properly falls within the reach of the RICO statute.**

[Emphasis supplied]; Id., 832 F.2d @ 39.

If conduct where misrepresentation to

twenty investors properly falls within the reach of RICO, can conduct involving misrepresentations to 400 do otherwise?

In Marshall-Silver Construction Company, Inc. v. Mendel, 835 F.2d 63 (3rd Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3592 (U.S. Feb. 12,1988) (No. 87-1358), another Third Circuit panel quoted the Barticheck language cited verbatim above and then identified the kind of activity targeted by RICO:

> The target of the RICO statute, as its name suggests, is **criminal activity that, because of its organization, duration, and objectives** poses, or **during its existence posed, a series of injuries over a significant period of time.** Here we have a single victim, a single injury, and a single, short-lived scheme with only two active perpetrators. This is not criminal activity with the kind of continuity of which we spoke in Barticheck.

[Emphasis supplied]; Id., 835 F.2d @ 66-67.

Under the facts of the instant case, 400 victims were injured by a scheme perpetrated by three corporate defendants and their employees. This case shows the kind of criminal activity that during its existence

inflicted a series of injuries over a significant period of time, and continues to this date. Until the last dealer termination, negotiation or lawsuit is concluded, the defendants will not have accomplished their entire scheme (albeit 95% of the terminated dealers succumbed to their artifices and threats within a year). Successful infiltrators of legitimate businesses should not escape RICO liability because they perpetrate one complex scheme to defraud over 400 businesses of their assets, on the premise that they may not have done it before, and may not do it again. In Hofstetter v. Fletcher, RICO Bus.Disp.Guide Par. 7065 (6th Cir.1988), the Sixth Circuit rejected the argument that proof was needed at trial of an "ongoing, separate enterprise", holding the argument was without merit, then stating:

> We note that some appellate courts have adopted a narrow definition of the term "enterprise" by requiring the plaintiff to establish that the "enterprise" was engaged in "continuing" criminal activity involving more than a "single criminal episode." See, e.g., Beauford v. Helmsley, 843 F.2d 103 (2nd Cir. 1988). In discussing the

> enterprise requirement under RICO, this court has stated, "**RICO applies both to legitimate enterprises conducted through racketeering operations** as well as illegitimate enterprises." United States v. Qaoud, 777 F.2d 1105, 1115 (6th Cir. 1985) (citing United States v. Turkette, 452 U.S. 576 (1981)). In Qaoud we held that although "enterprise" and "pattern of racketeering activity" are separate elements, they may be proved by the same evidence.

[Emphasis supplied]; Id., RICO Bus. Disp.Guide 7065 @ 8607.

It is this narrow definition of "enterprise" represented by cases like Beauford and the Fifth Circuit's Delta decision petitioner faults.

The Sixth Circuit is not alone in applying Turkette's teaching in this manner. Other circuits, including the Second, Ninth and Eleventh Circuits, have rejected the proposition that there necessarily needs to be evidence to show the enterprise beyond that necessary to show the pattern. See, e.g., United States vs. Bargaric, 706 F.2d 42, 55 (2nd Cir.), cert. denied, 464 U.S. 840 (1983); U.S. vs. DeRosa, 670 F. 2d 889, 895-96 (9th Cir. 1982), cert. denied, 464 U.S. 856, 104 S.

Ct. 175, 78 L.Ed. 2d 157 (1983); United States vs. Cagnina, 697 F.2d 915, 921 (11th Cir. 1983). In Bargaric, the court noted that they have applied RICO to situations where an enterprise was no more than the sum of the predicate acts:

> These decisions reflect the common sense recognition that a group of individuals may join together, and therefore be 'associated in fact', although not a legally cognizable entity in one of the traditional forms, solely for the purpose of conducting their activities.

Id., 706 F.2d @ 55.

These circuits have seized on Turkette's "coalesce" language to apply RICO "to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts." United States vs. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1983). It is respectfully argued that Turkette certainly stands for the proposition that the existence of the separate enterprise element must be proved, but that it may be proved with the same evidence that is used to prove the distinct

pattern element. No language in Turkette begins to indicate a complaint would be inadequate if there was no allegation such as was required herein by the Fifth Circuit. As was noted in R.A.G.S. Couture, Inc. vs. Hyatt, 774 F.2d 1350, 1353 (5th Cir. 1985):

> The Supreme Court's Sedima decision cautions us not to place barriers before RICO plaintiffs that are not found in the text of the statute. Moreover, the court has held that an enterprise may be organized solely for illegitimate purposes, and that evidence of the existence of the enterprise may coalesce with evidence of the underlying pattern of racketeering.

Id., 774 F.2d @ 1353.

The Fifth Circuit decision at issue has done just what Sedima and R.A.G.S. caution them not to do: it has erected barriers before this RICO plaintiff not found in the text of the statute.

In Seville Industrial Machinery Corp. vs. Southmost Machinery Corp., 742 F.2d 786, 790 (3rd Cir. 1984) the Third Circuit overruled a district court, holding it had "confused what must be pleaded with what must be proved." Citing the proposition that the Federal Rules

of Civil Procedure were designed to eliminate the vagaries of technical pleading that once plagued complainants, and to replace them with the considerably more liberal requirements of so-called "notice" pleading, the court held it is enough that a complaint put the defendant on notice of the claims against him. The pleading of a valid RICO claim should not place a plaintiff in the posture of a medieval necromancer seeking to summon some demon from the darkness through rigid adherence to some exact word-for-word incantation. As was noted in Weft, Inc. vs. G.C. Investment Associates, 630 F.Supp. 1138 (E.D. N.C. 1986), such a requirement is unnecessary. The Weft court stated this as follows:

> "Although the complaint does not use the terms contained in RICO, it is clear that the plaintiffs have alleged elements two and six or, in other words, the existence of an enterprise conducted through two or more acts constituting a pattern of racketeering...Although plaintiffs did not use the word "enterprise" to describe the actions of defendants, it is clear that they have alleged enough facts to constitute an enterprise ... Thus, the same facts which constitute the "unlawful acts" also establish the

> "enterprise" requirement. Moss vs. Morgan Stanley, Inc., 719 F.2d 5, 22 (2nd Cir. 1983), cert. denied, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed. 2d 684 (1984)." Weft, supra, 630 F. Supp. at 1142.

Id., 630 F.Supp. @ 1142.

In Lewis v. Sporck, 612 F. Supp. 1316 (N.D. Cal. 1985), the court dealt with the particularity with which a plaintiff must plead the enterprise:

> As to the pleading of the "enterprise", defendants assert that the complaint must describe with specificity an organized entity that has an on-going existence that is separate and apart from the racketeering activity which it is alleged to have performed. [citations omitted] However, the Third Circuit has recently held that a civil plaintiff need not plead all these attributes with specificity. Seville, supra at 790. The Ninth Circuit does not require such a detailed showing of an "enterprise". United States vs. Bagnariol, 665 F.2d 877, 891 (9th Cir. 1981). Absent a special reason to impose a stringent standard on the pleading of a RICO enterprise, the basic liberal pleading rule set forth in Rule 8 must govern.

Id., 612 F. Supp. @ 1324.

Rule 8 should have governed the instant dispute. The 12(b)(6) motion should have been denied.

THE AUTHORITY CITED BY THE FIFTH CIRCUIT

The Fifth Circuit cited several prior decisions of the Fifth Circuit as authority, including Manax v. McNamara, 842 F.2d 808 (5th Cir. 1988). Of great interest to petitioner is the citation by Manax of Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 (2nd Cir. 1987), cert denied, __ U.S. __, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988) as persuasively reasoned authority. Manax, supra, 842 F.2d @ 812. Petitioner wishes to point out that Beck recognized the following important premise:

> As Ianniello recognized, whether one looks for the requisite continuity and relatedness by examining the pattern or the enterprise is really a matter of form, not substance.

Id., 820 F.2d @ 51 [citing United States v. Ianniello, 808 F.2d 184, 191 (2nd Cir. 1986), cert denied sub nom Cohen v. United States, _ U.S. __, 107 S.Ct. 3229, __ L.Ed.2d __ (1987)].

Petitioner urges this Court to place substance over the form. The Second Circuit has granted en banc rehearing to reconsider its law on the continuing enterprise doctrine in Beauford v. Helmsley, 843 F.2d 103, RICO Bus.Disp.Guide

6900, 6919 (2nd Cir. 1988). As was noted in Beauford:

> Although ... we speak in terms of "enterprise" rather than "pattern", we nonetheless require continuity in any event, and find insufficient evidence of continuity in a single criminal episode regardless how many fraudulent acts it entails. In other words, a single criminal episode or scheme does not charge a claim under RICO because it lacks sufficient continuity to constitute an enterprise, even if its fraudulent acts constitute a pattern.

Id. @ 110.

The continuing enterprise requirement is also placed at issue in Creative Bath Products, Inc. v. Conn. General Life Ins. Company, 837 F.2d 561 (2nd Cir. 1988), petition for cert. filed, 56 U.S.L.W. 3755 (U.S. Apr. 19, 1988)(No.87-1738). This doctrine must be addressed.

CONCLUSION

It is respectfully submitted that the "continuing enterprise" theory used by both the Second Circuit and now the Fifth Circuit must be addressed. It is respectfully argued that if the continuity requirement of an enterprise is focused on whether the continuing activity of the enterprise is of the sort allowing

successful infiltration of legitimate businesses, then the inquiry must be resolved in petitioner's favor. Congress spread a broad but tightly meshed net with RICO. As noted in Sedima, supra, 105 S.Ct. @ 3286, RICO is to be read broadly, due to both the express admonition mandating liberal construction and due to Congress' self-consciously expansive language and overall approach. The RICO statute does not impose the artificial requirement at the pleading stage erected in this case. This august body must not allow a group of persons such as respondents to avoid RICO exposure for accomplishing a complex, multi-million dollar scheme to defraud terminated franchisees of their businesses and assets , merely because petitioner's complaint does not allege conclusionary language that respondents pose a continuing threat of conducting such activities in the future and/or other racketeering schemes perpetrated by defendants. The conduct which RICO was enacted to punish has been accomplished in

this case - legitimate businesses have been effectively invaded.

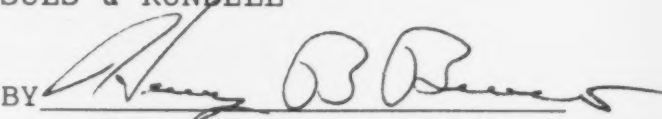
Continuity requirements for purposes of pleading an enterprise should not become artificial barriers releasing enterprises from RICO liability because multiple racketeering schemes/episodes (each composed of a pattern of racketeering activity) have not been asserted. This should not be allowed under either the "pattern" or "enterprise" element of RICO. If such is the law, enterprises like respondents will bloom secure in the knowledge that they will escape, if nothing else, RICO liability. In the shadow of such blooms will lie hundreds of legitimate businesses who have been infiltrated by enterprises whose persons allegedly did not pose the threat of continuing harm.

Petitioner wishes to clearly articulate it has not asserted and does not assert nor aquiesce in the proposition that the enterprise it sues has concluded or accomplished its goals. The enterprise is

ongoing and injuries continue to be sustained by petitioner to this very date. It is respecfully submitted that even assuming the scheme was completed on the date suit was filed, the remedial purposes of RICO are nonetheless implicated by the infiltration of hundreds of legitimate businesses. Accordingly, and with all due respect, Petitioner Delta Truck and Tractor Inc. humbly prays for relief.

Respectfully submitted,

GOLD, WEEMS, BRUSER, SHARP, SUES & RUNDELL

BY 

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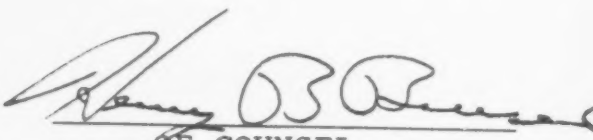
CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served by mailing the same upon opposing counsel of record, Mr. Miles P. Clements and Mr. Michael Fischer by United States Mail, First Class postage prepaid.

Alexandria, Louisiana this 19th day of December, 1988.



OF COUNSEL

DELTA TRUCK & TRACTOR, INC.,
Plaintiff-Appellant

v.

J.I. CASE COMPANY, et al
Defendants-Appellees

No. 87-4449

United States Court of Appeals
Fifth Circuit

Sept. 20, 1988

Franchisee brought civil RICO action against franchisor, corporation which acquired franchisor, and parent of acquiring corporation. The United States District Court for the Western District of Louisiana, Nauman S. Scott, J., dismissed, and franchisee appealed. The Court of Appeals, Clark, Chief Judge, held that franchisee's allegations were insufficient to state RICO cause of action because pleadings did not assert that defendants posed continuous threat as RICO persons.

Affirmed.

Reavley, Circuit Judge, concurred in the result.

1. Commerce 82.71

Civil sanctions of RICO were not intended to extend to fraudulent commercial transactions affecting interstate commerce. 18 U.S.C.A. Sections 1962(a-d), 1964(c).

2. Commerce 82.70

RICO "person" must be one that either poses or has posed continuous threat of engaging in acts of racketeering; "continuous threat" requirement may not be satisfied if no more is pled than that person has engaged in limited number of predicate racketeering acts. 18 U.S.C.A. Section 1961(3).

See publication Words and Phrases for other judicial constructions and definitions.

3. Commerce 82.71

Critical features of RICO pattern of racketeering activity-continuity and relationship-cannot exist in pattern of racketeering activity alone, and are instead reciprocal values that must function with at least one of the other essential elements of a RICO claim. 18 U.S.C.A. Section 1961(5).

4. Commerce 82.71

Acts of mail and wire fraud that were part of single, otherwise lawful corporate merger could constitute pattern of racketeering activity under RICO. 18 U.S.C.A. Section 1961(5).

5. Commerce 82.70

Under RICO, association-in-fact enterprise must have existence separate and apart from pattern of racketeering, must be ongoing organization, and its members must function as continuing unit as shown by hierarchical or consensual decision-making structure, enterprise must not be one that briefly flourishes and fades. 18 U.S.C.A. Section 1962.

6. Commerce 82.72

Franchisee's allegations against franchisor, corporation which acquired franchisor, and acquiring corporation's parent, failed to state RICO cause of action as matter of law because pleadings did not assert that corporate defendants posed continuous threat as

RICO persons; franchisee alleged as pattern of racketeering activity nothing more than numerous predicate acts which were necessary segments of otherwise lawful commercial endeavor, and claim that method of franchise termination fraudulently violated contractual rights or legal duties did not plead RICO violation. 18 U.S.C.A. Sections 1961(3, 4), 1962(a-d), 1964(c).

Appeal from the United States District Court for the Western District of Louisiana.

Before CLARK, Chief Judge, REAVLEY, Circuit Judge, and HUNTER, District Judge

CLARK, Chief Judge:

Delta Truck & Tractor, Inc. (Delta) appeals the district court's dismissal of its civil RICO action.[1] We affirm.

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[1] The Racketeering, Influence and Corrupt Organizations Act (RICO), 18 U.S.C. Sections 1961-1968, creates a civil cause of action under section 1964(c) against those injured by violations of section 1962(a)-(d). The portions of section 1962 relevant to this case can be abstracted as follows. Section 1962(a) makes it "unlawful for any person who has received any income derived ... from a pattern of (continued...)

I.

Review of a dismissal on the pleadings requires that we accept as true the non-moving party's well-pleaded allegations. Delta, a company involved in the sale and repair of farm equipment, operated under a franchise agreement with International Harvester Company (IH), a manufacturer of farm machinery. The dispute in this case arises out of the acquisition of IH by J.I. Case Company (Case), itself a manufacturer of agricultural equipment, and its parent company, Tenneco, Inc. (Tenneco). As part of the merger, Case, Tenneco and IH sought to create one cohesive dealership network by eliminating duplicative Case and IH dealers. The gravamen of Delta's RICO claim alleges that these three corporate defendants consolidated

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[1](...continued)
racketeering activity ... to use or invest ... any part of such income ... in acquisition of any interest in, or the establishment or operation of, any enterprise." Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise ... to conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity."

the dealerships through numerous acts of wire and mail fraud designed to appropriate the business assets of Delta and over 400 other terminated Case and IH dealers. After twice allowing Delta to amend its complaint, the district court granted the defendant's motion to dismiss.

II.

[1] Congress wrote RICO in broad, sweeping terms to combat the many, varied, anfractuous ways in which racketeers operate. Reduced to its three essentials, a civil RICO claim must involve: (1) **a person who engages in** (2) **a pattern of racketeering activity** (3) connected to the acquisition, establishment, conduct, or control of an **enterprise**. The Act's sanctions, however, were not intended to extend to fraudulent commercial transactions affecting interstate commerce. In the following ways, the principle of continuity limits the types of persons, patterns and enterprises that civil RICO actions may reach.

A.

[2] The object of all civil and criminal RICO actions is the RICO "person," the defendant. RICO defines person broadly to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. Section 1961(3). If we are to restrict RICO to the type of conduct Congress intended to proscribe, the RICO person must be one that either poses or has posed a continuous threat of engaging in acts of racketeering. In most cases, pleading the existence of a "pattern of racketeering activity" will supply this element of continuity to the RICO person. The continuous threat requirement may not be satisfied if no more is pled than that the person has engaged in a limited number of predicate racketeering acts. Two isolated acts of racketeering have been held sufficient to constitute a pattern under this Circuit's unique precedent.[2] But two such acts alone may fail to satisfy the

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[2] See infra Part IIB of this opinion.

continuous threat requirement. Cf. Mastercraft Indus., v. Breining, 664 F.Supp. 859, 861 (S.D.N.Y. 1987) ("plaintiff has alleged no continuing enterprise other than the defendants' lawful business, of which the particular fraud alleged is at best a minor part"); Proctor & Gamble Co. v. Big Apple Indus. Bldgs., Inc., 655 F.Supp. 1179, 1184 (S.D.N.Y. 1987) ("[T]he RICO defendants in this case were engaged in a single lawful project of finite scope and duration-constructing a television studio for a customer. Allegations of numerous instances of fraud in carrying out this project does not bring it within the scope of the RICO statute.").

B.

[3] A pattern of racketeering activity "requires at least two acts of racketeering." 18 U.S.C. Section 1961(5). Predicate acts of racketeering are defined to include wire and mail fraud. Id. at Section 1961(1)(B). In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87

L.Ed.2d 346 (1985), the Supreme Court noted that "while two acts [of racketeering] are necessary, they may not be sufficient." The critical features of a pattern of racketeering activity are continuity and relationship. Id. This continuity and relationship cannot exist in the pattern of racketeering activity alone. Continuity and relationship are reciprocal values that must function with at least one of the other essential elements of a RICO claim.

[4] One ground given by the district court for dismissing Delta's complaint was the failure to plead a pattern of racketeering activity. In any circuit other than ours, it may have been proper to dismiss Delta's complaint on the ground that the numerous alleged acts of mail and wire fraud were parts of a single, otherwise lawful corporate merger not constituting a pattern of racketeering. But in R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985), a panel of this court held that two acts of mail fraud that related to a single business transaction

constituted a pattern of racketeering activity. The district court declined to follow R.A.G.S. because of its lack of analysis and because of the statement in Armco Industrial Credit Corp. v. SLT-Warehouse Co., 782 F.2d 475, 481 (5th Cir. 1986), that the "'pattern of racketeering activity' language" in the RICO statute is something that must be interpreted in "the future." Several panels of this court have been critical of R.A.G.S.,[3] but each has been bound as we are by the fule of R.A.G.S. A request to reconsider R.A.G.S. "can only be made to the entire court sitting en banc, not to another panel." Smith v. Cooper/T. Smith Corp., 846 F.2d 325, 329 (5th Cir. 1988) [vacated by August 1, 1988 order for rehearing en banc]. The district court was not free to depart from R.A.G.S. We must assume a

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[3] See e.g., Crocker v. FDIC, 826 F.2d 347, 348 n. 2 (5th Cir. 1987) cert. denied, ___ U.S. ___, 108 S.Ct. 1075, 99 L.Ed.2d 235 (1988); Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426 (5th Cir. 1987). In our view, the criticism is warranted.

sufficient pattern of racketeering activity was alleged.

C.

[5] The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962. An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. Section 1961(4). In United States v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981), the Supreme Court stressed that continuity is a necessary attribute of an association-in-fact enterprise. We have incorporated this notion of continuity into our definition of such enterprises. An association-in-fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical

or consensual decision making structure. Manax v. McNamara, 842 F.2d 808, 811 (5th Cir. 1988); Foval v. First Nat'l Bank of Commerce, 841 F.2d 126, 129-30 (5th Cir. 1988); Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426-27 (5th Cir. 1987); Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438, 440-41 (5th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. 3276, 97 L.Ed.2d 780 (1987); Shaffer v. Williams, 794 F.2d 1030, 1032 (5th Cir. 1986). Thus, the enterprise must not be one that briefly flourishes and fades. It must be one that, in the words of Turkette, "functions as a continuing unit." 452 U.S. at 583, 101 S.Ct. at 2528.

III.

[6] The district court properly dismissed Delta's second amended complaint. Delta has attempted to state a RICO claim by alleging multiple acts of fraud that were part and parcel of a single, discrete and otherwise lawful commercial transaction. This claim fails to state a RICO cause of action as a

matter of law because the pleadings do not assert that the corporate defendants posed a continuous threat as RICO persons. Delta has alleged as a pattern of racketeering activity nothing more than numerous predicate acts which were necessary segments of an otherwise legitimate and singular commercial endeavor-the Case/Tenneco acquisition of IH and related efforts to combine the dealer network. Delta's claim that the method of termination of one or all dealerships fraudulently violated contractual rights or legal duties does not plead a RICO violation.

The judgment appealed from is

AFFIRMED.

REAVLEY, Circuit Judge, concurs in the result.